

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of	)	
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	

**COMMENTS OF TOWN OF HERNDON, VIRGINIA**

Town of Herndon, Virginia (Herndon) files these comments in response to the Notice of Inquiry (“NOI”), released April 7, 2011, in the above-entitled proceeding. Through these comments, Herndon seeks to provide the Commission with basic information regarding its local right-of-way and facility management practices and charges.<sup>1</sup> The Commission should not interfere with these local policies here. Herndon has developed considerable expertise applying its policies to protect and further public safety, economic development, and other community interests. By adopting rules in this area, the Commission could disrupt this process at substantial cost to local taxpayers and to the local economy. We believe that a basic respect for federalism, a fair reading of the Constitution and the Communications Act, and an honest assessment of the Commission’s limited expertise on local land use matters all point to the same conclusion: this is no place for federal regulation.

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<sup>1</sup> We use the term “charges” to include both any cost recovery that is part of right-of-way and facility management (such as permitting fees), as well as other compensation we may receive from communications companies for use of the rights-of-way and other facilities consistent with state and local law.

Herndon has successfully managed its property to encourage deployment of several broadband networks to date. As a result, broadband service is available to 100% of the households and businesses in our jurisdiction. There is no evidence that our policies or charges with respect to placement of facilities in the rights-of-way or on Town property (such as water towers) have discouraged broadband deployment. Our community *welcomes* broadband deployment, and our policies allow us to work with any company willing to provide service. No company has cited our policies as a reason that it will not provide service. We believe our policies have helped to *avoid* problems and delays in broadband deployment by ensuring that broadband deployment goes smoothly for both the providers who follow the rules and the larger community. Herndon has granted and currently has in place 20 franchises and 13 water tower leases for telecommunications providers. Herndon has granted two cable television franchises to providers that also provide telephone and other telecommunications services. The Town in 2011 improved and expanded the ability of telecommunications providers to erect towers on private land. On the other hand, we also know that many entities seeking access to our rights-of-way and facilities would prefer to live without rules or regulations, to the great detriment of other users, abutting landowners, commuters, and the general taxpayer. Herndon is mandated to grant long term leases of public property and franchises to use public streets by the Constitution of Virginia and by enabling statutes by using a public legislative process. Herndon as a municipal government must so act by ordinance after a public hearing requiring formal and complete professional managerial, engineering and legal staffing. Yet, it is common to receive from telecommunications providers or their contractors informal, incomplete, or incoherent submissions on stock, legalistic and wordy documents that are unreviewable and un-approvable.

In response to the NOI, Herndon provides the following information:

I. *Application Procedures, Forms, Substantive Requirements, and Charges.*

The Commission asks whether all necessary application procedures, forms, substantive requirements, and charges are readily available.<sup>2</sup>

Herndon applies the following right-of-way management and facility placement procedures. Article VII §9 of the Constitution of Virginia (1971) requires a public process before any franchise to use public streets of long term lease of public property may be granted. Sections 15.2-2100 through 15.2-2108.1:1, Code of Virginia, carry out these constitutional mandates. <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+15.2-2100> Herndon staff receives a proposal, reviews it from engineering, management, and legal perspectives; and makes a recommendation to the Herndon Town Council (Council). In the cases of leases of water tank, a zoning and architectural review are also performed. The Council acts by ordinance after a public hearing.

The Council is prevented by § 56-468.1, Virginia Code <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+56-468.1> from imposing any franchise fees or street opening fees for use of streets by telecommunications providers. This fee is determined by the Virginia Department of Transportation and is currently \$.83 per access line. Some providers maintain no access lines and so Herndon received no fees. Herndon receives \$182,870 per year from the public rights-of-way use fee. Herndon also charges small incidental fees for street opening permits to ensure public safety. The telecommunication providers do not pay these fees because they were preempted by the public rights-of-way use fee, through a permit process for coordination and public safety is still undergone in every case.

The Council charges a standard \$2,550 per month for use of its water towers for telecommunication facilities. The fee and charges for cable service providers are based on and

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<sup>2</sup> NOI ¶ 14.

controlled by town, federal, and Virginia law as well as on negotiations that underlay the agreement by Herndon and the cable providers for these cable franchises.

## **II. *Sources of Delays.***

The Commission asks what factors are chiefly responsible to the extent applications are not processed in a timely fashion. The Commission also asks about errors or omissions in applications.<sup>3</sup>

In Herndon most applications are processed very quickly. However, in some cases, it is common to receive from telecommunications providers or their contractors informal, incomplete, or incoherent submission on stock, legalistic and wordy documents that are unreviewable and unapprovable. These factors cause the inappropriate delay that is overlayed to the built in, desired delay inherent in a representative democracy in the legislative approval process.

## **III. *Improvements.***

The Commission asks whether there are particular practices that can improve processing.<sup>4</sup>

Herndon has recognized a number of practices that have improved the process. Applicants should be represented by counsel, who will assure that the draft lease (on Herndon provided form for convenience of all) and the accompanying engineering documents are complete, accurate, and coherent. Herndon will consider and approve any coherent, complete, and accurate franchise or lease that the applicant may submit. There is no specific requirement

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<sup>3</sup> *Id.*

<sup>4</sup> NOI ¶¶ 14, 29.

that these instruments be on Herndon's form, though federal and State law enjoin consistency and uniformity in treatment of telecommunication providers.

#### IV. *Permitting Charges.*

The Commission seeks data "on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees." Specifically, the Commission asks commenters to identify:

- the type of facilities for which such charges are assessed;
- how such charges are structured (e.g., per foot or percent of revenue in the case of rights of way fees);
- whether the community is subject to comprehensive state franchising or rights-of way-laws;
- whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms, and conditions; and
- the value of any in-kind contributions required for access or permit approval.

The Commission further asks whether such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching in roadways.<sup>5</sup>

In Herndon, the Council is prevented by § 56-468.1, Virginia Code <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+56-468.1> from imposing any franchise fees for use of streets by telecommunications providers. This fee is determined by the Virginia Department of Transportation and is currently \$.83 per access line. Some providers maintain no access lines and so Herndon received no fees. Herndon receives \$182,870 per year from the public rights-of-way use fee. Herndon also charges small incidental fees for street opening

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<sup>5</sup> NOI ¶ 17.

permits to ensure public safety. The telecommunication providers do not pay these fees because they were preempted by the public rights-of-way use fee, through a permit process for coordination and public safety is still undergone in every case.

The Council charges a standard \$2,550 per month for use of its water towers for telecommunication facilities. The fee and charges for cable service providers are based on and controlled by town, federal, and Virginia law as well as on negotiations that underlay the agreement by Herndon and the cable providers for these cable franchises.

**V. *Local Policy Objectives.***

The Commission asks what “policy goals and other objectives” underlie the local practices and charges in this area.<sup>6</sup>

In Herndon, our policies are designed to achieve the following:

Facilitate the responsible deployment of services; make the services broadly available; ensure public safety; avoid traffic disruption; maintain and repair roadways; prevent public disruption and damage to abutting property; minimize accelerated deterioration to roads that accompanies street cuts; satisfy aesthetic, environmental, or historic preservation concerns; avoid damage to the property of others; obtain fair compensation for use of public property, where allowed by law of the Commonwealth.

**VI. *Possible Commission Actions.***

Finally, the Commission asks what actions the Commission might take in this area.<sup>7</sup>

As noted above, Herndon strongly urges the FCC to refrain from regulating local right-of-way management and facility placement processes. These are highly fact-specific matters,

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<sup>6</sup> NOI ¶ 22.

<sup>7</sup> NOI ¶ 36.

which turn on local zoning and engineering practices, local environmental and historical conditions, local traffic and economic development patterns, and other significant community concerns and circumstances. These matters are managed by local staffs with considerable expertise. Imposing a federal regulatory regime would create unnecessary costs for our community, and it would have the potential to undermine important local policies. Likewise, Commission regulation of charges for use of the rights-of-way could have significant impacts on the community, and may actually make it infeasible to continue to maintain or provide important public services. If the Commission feels compelled to act in this area at all, it should limit itself to creation of useful forms, voluntary programs, and educational activities, and to implementing its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

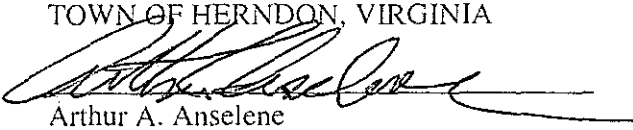
## **CONCLUSION**

Herndon urges the Commission to conclude that right-of-way and facility management and charges are not impeding broadband deployment. As indicated above, in Herndon, our policies and procedures are designed to protect important local interests, and have done so for many years. There is no evidence that the policies have impaired any company from providing broadband service here, and there are many reasons to believe that federal regulations would prove costly and disruptive to our community.

Respectfully submitted,

TOWN OF HERNDON, VIRGINIA

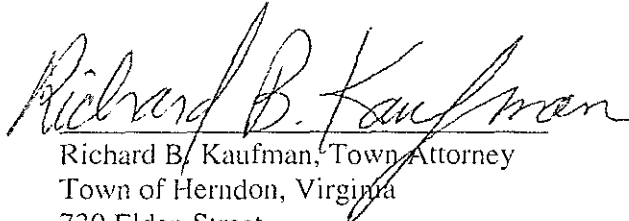
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